(25)

No. 463.

IN THE

Supreme Court of the United States

October Term, 1942.

ALEX RANIERI,
PETITIONER,

v.

THE UNITED STATES.

REPLY BRIEF FOR PETITIONER.

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INDEX.

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I.

Errors in Respondent's Statement of Facts, and Argument.

Respondent summarizes the findings, giving citations claimed to but which do not support them, and in so doing states as facts matters contrary to conclusive evidence offered by respondent itself, and omits convincing parts of evidence, giving a wholly different aspect to questions at issue, as follows:

1. As to progress in the work, (Rspdt's Brf. ps. 3, 4, 8), respondent admits that petitioner commenced work promptly (*Id.* p. 3),—he was excavating and placing material to

dry November 16th, 1931. Petitioner was forced to work on different lots at different times because of the wetness of the material, working at the one least wet, and going from one to the other as they were less wet. (Deft's. Ex. 52 A-D, its Work Record.[1]) Respondent objected to placing sloughing material. Petitioner replied that there was no other soil, and respondent directed petitioner to proceed and not shut down. (R. 44.)

All claims that petitioner did not accomplish work as fast as he should have are more than overcome by the fact that he lost most of 160 days, (half the period he was engaged in the work), and parts of every day through the bad condition of the soil, as respondent proved. (Deft's. Ex. 52 A-D.)

2. As to the finding that,—

> "There was sufficient satisfactory material in the borrow pits and in the available section of the old levee from which to construct a B-section". (pp. 4, 8 of Rspdt's. Brf.)

The material was to be obtained solely from the borrow pits, and not from an existing levee. (Ptn. p. 12; R. bot. p. 52, top pp. 53, 46.)

Respondent's citations to sustain this finding fail to support it, and on the contrary contradict it:

McWilliams, (whom New, the officer in charge, testified was an old levee builder and *a very good one,* (R. 54)), swore that the soil was so bad as to be dangerous, and that

[1] Exhibit 52 A, B, C and D, filed by respondent, and made a part of the Record herein, is its written Weekly Report for each day's work on Lots A, B, C, and D, showing weather, soil conditions, "any event of importance," and "Remarks". An abstract of this Report is filed in the Appendix.

the work could not have been completed in the contract time.[2]

Klorer swore that where there was a cypress swamp, as here, the soil is water soaked, very hard to get the water out, and drains with difficulty, and that as the material was wet it would not serve for a B-section levee. (R. 51.)

New, the officer in charge, testified that slides after the work was started, made it so doubtful whether the levee could be built with the only material available that new and adequate borings became necessary, with soil analysis and stabilization computation. (R. 52.)

He states that there was sufficient soil in the pits to build the levee "even allowing for the presence of the stumps", but not that the soil was satisfactory. *(Id.)*

He says that the soil was not in as good condition as it should have been; that it had a tendency to slough; that it did not readily give up its moisture content; and that there were cypress trees found throughout the length of the job. (R. 53.)

Huesmann, (an expert witness), testified that the soil used and available was satisfactory to build a levee, but he did not say a B-section levee, and he qualified this by adding that the statement was without reference to the

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NOTE 2:

It was a dangerous piece of work on account of the character of the soft material; the levee could not have been completed within the contract time, 450 days. The base should be put in one year and the top put on in another. Taking this job as I found it, when I came there it would have been a dangerous proposition to have attempted to bring it to gross grade. It would have been impossible at that time. The slope defendant required was not a practicable one. (R. 50.)

length of time it would take to bring it up to its height and grade. (bot. R. 55.)

Moreover, his opinion is based on the showing of the borings chart that 34% of the soil was loam, whereas 140 out of 142 inspection reports show that there was no loam. (Deft's. Ex. 52 A-D; R. 55.)

He testified further that he saw cypress stumps 27 feet deep in the pits, and if it is an old cypress swamp and the vegetation has grown in there for quite a period, you get clay, silt and sand deposited over it, and the organic content will be high. When there are cypress swamps they allow one-third more for wastage and subsidence. (R. 56.)

So, as stated above, the testimony of the four witnesses cited by respondent show beyond question that all the available soil was "totally unfit".

That the soil not "satisfactory" but was totally unfit, very wet, sloughy, permeated with cypress stumps and organic matter (Soil prohibited by Sects. 22-9 and Art. 7, R. 17, 18, 24) was conclusively proved also and almost wholly by respondent itself, as appears in detail in Note 6, p. 4 of the Ptn., and Appendix, *infra*.

The claim is, too, in conflict with,—(1) Respondent's work record, (which is conclusive that), petitioner lost half his time through the material being bad (Deft's. Ex. 52 A-D); (2) the 142 Record reports, which prove that the material was in bad condition,—very wet *(Id.)*; (3) the 107 notices respondent gave petitioner that the material was bad (R. 32); and (4) with respondent's answer that the material was "totally unfit" (R. 10), as well as (5) the finding in the opinion that

"plaintiff ran into many difficulties in handling * * *" (it), "encountering cypress stumps and other organic matter which caused damage to his machinery", and "he" (petitioner) "also had difficulty with sloughs and slides". (R. 39.)

Respondent is estopped,—through its oft repeated contention, continued throughout the progress of the work and the trial that the soil was "totally unfit" (Ptn. Note 21, p. 6),—from now contending that it was "satisfactory", (Ohio & M. R, Co. v. McCarthy, 96 U. S. 258; Ritter v. U. S., 28 F. (2d), 265, 267).

3. As to the finding that,—

"The new levee was eventually constructed from these sources,—the borrow pits and the old levee". (p. 4 of Rspdt's. Brf.)

The new contractors were paid once and a half petitioner's price, and took once and a half the time stipulated, (R. 51, 56),—(and no soil was or was to be taken from the old levee, but petitioner was confined to the borrow pits for soil, Ptn. 12; R. 46, 52, 53),—proving that the soil must have been unfit,—the opposite of respondent's contention.

4. As to the claim (p. 8 of Rspdt's. Brf.) that,—

"The levees adjoining at both ends the one here * * * were completed within the contract time and without difficulty".

Evidence of this nature is incompetent in the Federal Courts and should not be considered,[1] and this is especially

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NOTE 1:

"* * * that as to the * * * question addressed to that witness and excluded, * * *, whether the cut was not constructed as cuts were ordinarily constructed * * *, the court did not err in its exclusion, * * * and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead; * * *." (Union Pac. Co. v. O'Brien, 161 U. S. 451, 457.)

true here because even in State Courts which admit such evidence an exact similarity must be proved, and here dissimilarity was proved: New, the officer in charge, testifies that a difference of a foot or two in the height of the levee will determine whether or not it will slide, and that the two adjoining levees were of less height. (R. 52.)

5. As to the finding,—

> "Borings had been taken over the site of the proposed levee at intervals of 1,000 feet each to a depth of 25 feet, and a chart of these borings appeared on the contract map". (p. 4 of Rspdt's. Brf.)

Respondent proved that they were utterly inadequate.[2]

Moreover, respondent, previous to the work, approved petitioner's plan of operation and his machinery. (New, R. 52; Maxon, R. 46.)

Respondent's act in presenting the borings chart (Deft's. Ex. 16) was a representation that adequate borings had been taken, and, as they were utterly inadequate, this was a deception, entitling petitioner to rescind the contract (U. S. v. Atlantic Dredging Co., 253 U. S. 12); and

Respondent, previous to the work, approved petitioner's plant and plan of work (R. 46),—

NOTE 2:

"The original borings were taken on 73% of the project, every 1000 feet. There were 17 borings taken. They were each 2 inches in diameter, and represented an area of 54 square inches, and the pits were around 300 feet wide, and they were over 22,000 feet in length, and expressing it in percentages, it would give you one five-millionth of one per cent area, or the surface represented one five-millionth of a per cent of the borrow pit area. The field men are instructed to take borings at intervals of 5 feet, and when there is a change in the strata, to take a sample of that at every change." "The second set of borings were taken 200 to 400 feet apart during the work." (Rspdt's. witness, Heusman, R. 55.)

"which was assurance that the chart was correct and justification of reliance on it". *(Id.)*

6. As to the finding,—

"there was no evidence to show that the borings were inaccurately charted" (p. 5 Rspdt's. Brf.), "these borings were accurately charted and properly reflected the condition of the soil to be encountered" (p. 11 Rspdt's. Brf.); and

As to the contention that,—

"Only where the United States either represents itself as having knowledge which it does not possess or fails to convey information as to hidden conditions which it does possess is it held to warrant subsoil conditions". (Ps. 12, 13 Rspdt's. Brf.)

(a) *Respondent must have known the "totally unfit" condition of the soil.*

Inadequate as the borings were, none the less they must have revealed the cypress stumps, the wet condition of the soil and the foreign matter in it, and the Court below so stated,—

"Any sort of investigation * * * would have shown him that he would probably encounter wet soil; that it is not unusual to encounter cypress stumps; that water and such stumps are frequently found in that section, especially where there is an extra heavy growth of sugar cane, as in the instant case." (Bot. R. 41.)

Respondent urges that,—the presence of cypress trees "was a common occurrence" in the vicinity of the site "and to be expected". (Note 4, p. 10.)

New, respondent's officer in charge, knew that there would be cypress stumps. (Bot. R. 53.) He testified,—

"everyone expects to encounter some cypress stumps".

(b) *The chart both concealed and misrepresented the condition of the soil.*

Respondent's borings chart described the soil by names but stated as to its condition only that 10% was soft clay, and did not show that it was wet and filled with foreign matter and cypress stumps. (Deft's. Ex. 16. See also Klorer, p. 51.)

Clearly the one statement as to the condition of the soil that 10% was soft clay was an exclusion of any other defect or unfitness under the maxim "*expressio unius est exclusio alterius*", (17 C. J. S. §312, p. 730), and the failure to show the foreign matter, cypress stumps and sloughy wet condition was both a concealment and a misrepresentation. (Hollerbach v. U. S., 233 U. S. 165, 172.)

Respondent claims that Heusmann testified that the soil found was similar to that shown in the chart, but he did not testify that its unfit condition was shown in the chart,—the sole question involved. This witness also based his opinion on the fact that the chart showed 34% loam, but only 2 out of 142 inspection reports show any loam. (R. 55; Ptn. R. 13.)

Finally, respondent forecloses itself from its argument that

> "these borings were accurately charted and properly reflected the condition of the soil." (P. 11.)

By admitting, as it does, that petitioner was entitled to a finding that there were cypress stumps in the pits (Note 4, p. 10), and by proving, as it did, that the chart did not show the cypress stumps. (Deft's. Ex. 16; Klorer, R. 51.)

(c) This Court in a leading case foretold that contractors generally would suffer through inadequate borings just as petitioner here suffered through making the ruinously low bid of 12.40 cents per yard for work which respondent proved was worth 20 cents per yard. (R. 54, 56, 51, 48.)

> "Knowledge of the result of such investigations would protect the government, it might be, against an extravagant price based on conjecture of conditions, and enable contractors confidently to bid upon ascertained and assured data." (Christie v. U. S., 237 U. S. 234, 241.)

Although respondent may not have foreseen or planned it, the result of presentation of the chart made from the utterly inadequate borings, and the approval of petitioner's plan of work and his plant (R. 46), which

> "* * * was an assurance * * * of the truth of the representation, and a justification of reliance upon it", (U. S. v. Atlantic Dredging Co., *supra*),

resulted in petitioner's low bid of 12.40 cents on work which respondent proved was worth 20 cents a yard. These facts entitled petitioner to rescind. *(Id.)*

(d) Respondent's contention (p. 10, Note 4) that the presence of the cypress trees did not interfere with the successful conclusion of the work is in conflict both with the finding of the Court and uncontradicted and conclusive evidence.

(1) The proof on this question was, respondent proved that the work was worth 20 cents per yard instead of 12.40 (Ptn., Note 18, p. 6), which petitioner was induced to bid through the concealments and misrepresentations in the chart;

(2) Petitioner was delayed 30 to 40% because of the cypress trees (O'Mera, R. 44); and

(3) The Court found,—

> "Plaintiff ran into many difficulties in handling the soil from the borrow pits, encountering cypress stumps and other organic matter, which caused damage to his machinery. He also had difficulty with slough and slides." (R. 39.)

This Court emphasized in a leading case how important the failure to show the cypress trees,—(in that case logs),—was, saying,—

> "And how important it was to know the conditions is established by the finding that claimants were put to an expense of $6,150 over what would have been necessary 'if the borings sheets had represented the character of the ground with respect to logs'." (Christie v. U. S. *supra*, pp. 241, 242.)

(e) As respondent presented the borings chart showing that there was no defect in soil conditions except 10% soft clay (Deft's. Ex. 16), it is,—

> "a matter concerning which the Government might be presumed to speak with knowledge and authority." (Hollerbach v. U. S., 233 U. S. 165, 172.)

The Court continued,—

> "* * * this positive statement of the specifications" (here of the borings chart) "must be taken as true and binding upon the government, and that upon it, rather than upon the claimants, must fall the loss resulting from such *mistaken representations.*" *(Id.)*

7. Respondent's contention (p. 12), that petitioner should have foreseen the unfit condition of the soil is in conflict with similar decisions of this Court, and in conflict as well with respondent's own contentions.

(a) This question arose under similar conditions in Christie v. U. S., *supra*,[1] where the conditions were similar to those here, but respondent's contention was on a far sounder basis than exists here, because in the case cited "they" (the contractors) "admitted," they had reason to and did expect to "encounter some logs," (while here petitioner was unfamiliar with the site and the locality, R. 31) yet the Court overruled the contention and held that the contractors had the right to rely upon the borings chart. The same principle was established in Hollerbach v. U. S., *supra*, and in U. S. v. Spearin, 248 U. S. 135, and in spite of a contract provision requiring the contractors to examine the site. There is no such provision in this contract.

8. As to the finding that,—

> "the petitioner had no experience in building levees" (R. 31),—

this is true, and respondent was bound to take this into account in all the steps leading up to the contract,—particularly in presenting the borings chart, and in approving petitioner's work plan and his equipment. During the entire period of work, however, he had competent and experienced superintendents,—men qualified to deal as well as could be with the "totally unfit" soil available (R. 43, 45, 46, 50); and New testified that McWilliams, petitioner's superintendent, "is an old levee builder * * * and a very good one." (R. 54.)

NOTE 1:

"The contentions are attempted to be supported by the alluvial character of the river, as we have said, its tortuosity, its fluctuations between high and low water in winter and summer, and that for twenty years the United States had operated snag boats for the removal of stumps and sunken logs from the channel of the river. But inferences from such facts could only be general and indefinite, and were not considered by the government as superseding the necessity of special investigations and special report. It assumed both were necessary for its own purpose and subsequently would be to those whom it invited to deal with it."

9. As to the finding that respondent served a large number of notices, claiming that petitioner did not do the work properly in specified particulars (ps. 5, 9 of Rspdt's. Brf.), and respondent's contention that petitioner was not entitle to a finding that the soil was wet and sloughy because,—(1) this condition resulted from petitioner's faulty methods; (2) rain and seepage were common occurrences; (3) it was petitioner's duty to so handle the soil as to reduce sloughing to a minimum; (4) other contractors completed the work with this soil; and (5) experts swore that the work could be completed with the soil. (*Id.* p. 9.)

Respondent's officer in charge swears that petitioner's superintendent McWilliams was a very good levee builder (R. 54), yet he became superintendent in July, 1932 (R. 48, 50). In the 8 months of work up to then only 51 violation notices were given, 24 of which were duplicates, and 11 of which stated that the soil was wet or showed a tendency to slough (Deft's. Ex. 15), and for the next 5 months 13 of the 16 slides occurred (Deft's. Ex. 16), and McWilliams was given 180 notices. (Deft's. Ex. 15.) Over three times more notices were given in the 5 months McWilliams was superintendent than in the preceding 8 months, and 13 slides occurred in the 5 months as against 3 in 8 months. (Deft's. Exs. 15, 16.)

So, respondent's flattering endorsement of McWilliams, and these comparative records constitute an admission by respondent that there was no faulty work during his superintendency, and that there could not have been any during the far more efficient preceding superintendency, and that the troubles with the work arose from the soil being "totally unfit" and not from bad work.

McWilliams was a very good levee builder and on this record his predecessor must have been far better.

Still again, there is really no issue here as to bad work: Petitioner placed 1,550,822 cubic yards which became part of the levee. (Ptn. p. 6, Note 17). Even if he had somewhat increased the difficulties arising from the "totally unfit" soil, (and he did not) that was his loss and did not effect respondent.

Respondent put in evidence Exs. 52 A-B-C-D, its report of daily progress of the work, showing weather, soil conditions, delays, "*any events of importance for each day*", and "remarks",— a complete record, made on the job, and binding on respondent. (Snell Isle Inc. v. Comr. Int. Rev. 90 F. (2d) 481, 482; Landay v. U. S. 108 F. (2d) 698, 704).

They do not charge petitioner with the violations claimed in the violation notices. (R. 32-34; Respondent's Brf. pp. 5, 9.) They mention only and in but a few instances insufficient drainage caused by seepage or heavy rains, or breakdown of a machine, proving, (as do the notices also Deft's. Ex. 15) any violations must have been corrected before the Report was made, or that they never occurred.

The Daily Reports show that drainage was maintained as far as possible, and that pumps were operated day and night. The witnesses also testified that,— petitioner placed no soil on the levee during rains; water was not permitted to remain between fills (R. 44, 45, 46, 47, 48, 49); adequate provisions were made for drainage; it was impossible to get the water out of the ground. (R. 46, 47, 48.)

So, from respondent's endorsement of McWilliams as a very good levee builder (R. 54); from the failure of its Daily Reports to charge petitioner with faulty work; and from the proof by the Daily Reports and by the witnesses that the petitioner did drain the levee well, it clearly appears that the bad condition in the levee did not result from faulty work.

Next, the evidence shows conclusively that this bad condition existed in the borrow pits, and that this condition of the soil inevitably continued after its being placed in the levee:

The fact that the soil in the borrow pits was wet, sloughy, filled with foreign matter and with cypress trees, is fully shown under "2." hereinabove and in Note 6, p. 4 of the Petition, and here we will say only,—

Of respondent's 142 Daily Reports, which it put in evidence, 100 show that the soil was wet, very wet, and sloughy (see Appendix), and this alone is conclusive evidence. Not one Report shows the soil to be dry.

10. As to the contention that,—

> "The evidentiary facts found by the Court below are not inconsistent with its ultimate findings in respect to the character of the earth". (p. 9 of Rspdt's. Brf.)

this matter is fully covered in the Petition, ps. 10 to 13 incl.

That there was no basis for the finding that the soil was "satisfactory", but that it is in conflict with respondent's own conclusive proof and with the evidence as a whole, is fully shown under "2." and "9." hereinabove.

11. As to respondent's contention (pp. 10, 11) that the provisions of Article 7 of the contract (R. 24) and Section 22 a of the Specifications (R. 17, 18) that the soil used must be "of the best grade, clean earth, free from all foreign matter, which would not slough or show a tendency to slough" are obligations * * * upon the contractor whose duty it was to select from the material at hand, which the United States undertook to furnish, suitable material, as the Court below found (R. 37); that there was suitable material available * * *; and that the failure of the petitioner to select that material, not the failure of the United States to provide such material, caused petitioner's loss. (pp. 10, 11 of Rspdt's. Brf.)

(a) *There was no "suitable" soil in the borrow pits which petitioner could have selected.*

The "totally unfit" condition of the soil is fully shown under Note 6, p. 4 of the petitioner, and under "2." and "9." hereinabove.

In addition, it will be found that neither the Daily Reports (see Appendix, *infra*), nor any of the 231 notices served (Deft's. Ex. 15); nor any witness described the soil as "suitable" or "fit", much less as "of the best grade".

Nor does any one of these papers in the case or any witness testify that the soil was partly good and partly bad, so that petitioner might have "selected" fit material.

All of the papers and all of the witnesses describe the soil as being uniformly unfit,—unfit throughout,—all of it unfit.

The contention (p. 11) that petitioner might have selected "satisfactory" soil appears for the first time in the findings and opinion of the Court. (R. 40, 41.) No witness testified that such a selection could be made nor does any paper in evidence support this contention. All of the evidence verbal and written is to the contrary.

Heusmann, the one witness who used the word "satisfactory", said that the material used and available was "satisfactory", (R. 55) which means all of it, which is in direct contradiction of the Daily Reports, (conclusive evidence) (Appendix, *infra*), of the notices (R. 32), of the answer (R. 10) and of the testimony of all other witnesses. (R. 43-56.)

There is no evidence whatever that there was any "suitable" or "fit" soil, and only the testimony of Heusmann that it was "satisfactory" where he admitted his statement was "without reference to the length of time" for completion, and provided that there was 34% of loam, as shown by the chart, and there was practically no loam. (R. 55.)

The contention that there was enough "satisfactory" soil which petitioner could have selected (Rspdt's. Brf. p. 11) is in conflict with the position taken by Respondent throughout the work, in its answer, and throughout the trial (Ptn. Note 21, p. 6).

If there was plenty of "satisfactory" soil for petitioner to select, then the second set of borings (R. 55) would have been wholly unnecessary.

(b) *The provisions of Article 7 and Section 22-a* (R. 24, 17, 18) *were obligations of Respondent,—not of petitioner.*

(1) Respondent agreed to furnish the soil. (R. 16.) If Respondent were correct in its contention that petitioner was bound to select fit soil from the pits, he could select it only in case it was there, and it appears conclusively from (a) last above, and from "2." and "9." above, and from Note 6, p. 4, and Note 21, p. 6 of the Petition that there was no such soil in the pits.

So, petitioner could well be excused from performance because it was impossible.

(2) The doctrine is established by this Court that ordinarily the one who is to be supplied with an article by another is not obliged to pick it out of a mass, and while that may be limited by petitioner being liable to select good material if it existed separate and apart from the unfit material, the general doctrine seems applicable here because New, the officer in charge, swears that the cypress trees extended throughout the entire length of the pits (R. 55), and the fact that pumps had to be used on the pits as a whole, (Deft's. Ex. 52 A-D), shows that the wet, sloughy condition must have prevailed throughout the pits, and the Daily Reports (*Id.*) show conclusively that all the material was wet and sloughy.

The doctrine that a buyer is not obliged to select was laid down in the case of goods where selection would have been easy, and should apply much more here where the finding of any fit earth below the surface would have been a hopeless and endless excavation task.

> "The seller * * * has no right * * * to require him" (the buyer) "to select part out of a greater quantity." (Norrington v. Wright, 29 L. Ed. 366, 369).

(c) *That securing best grade soil was an obligation of petitioner is not supported by the decisions, but is in conflict therewith.*

Respondent cites no authority for this contention (p. 11), but simply states that the obligation is that of petitioner.

This Court laid down the principle at stake in Philadelphia Etc. R. R. Co. v. Howard, 13 How. 307, where it was held that where a contract stated that the contractor was to place earth "where ordered by the engineer", the owner was bound to provide a place, and, of course, a reasonably convenient place as well as seasonably to give the order.

The precise question at issue here was involved in McPherson v. San Joaquin County, 124 Cal. xvii, 56 P. 802, where it was held that the contention that where the contract provides that "all * * * materials * * * used * * * shall be of the best quality and suitable", the contention that it was the contractor's duty to use any material furnished, and if it happened to be wholly unsuitable, it was still his duty to use it, was held to be "neither sound in law nor in morals".[1]

As Respondent agreed to furnish the soil, (R. 16), the provision that it should be of the "Best Grade" (R. 24)

NOTE 1:

"When defendant undertook to furnish casing it agreed to furnish casing suitable for the purpose. But in the specifications is a clause which, fairly construed, we think, in terms put upon defendant the duty to furnish suitable casing. It reads: 'The bidder to whom the contract may be let will be required to enter into an agreement * * * to furnish and erect machinery and plant of the most approved kind, and all tools and materials of every description used in the prosecution of the work shall be of the best quality * * *. * * *.' Respondent contends that it was plaintiff's duty to use any casing furnished, and, if it happened to be worthless and wholly unsuitable, it was still his duty to use it, and take the consequences, to which the maxim '*Damnum absque injuria*' applies. This contention is neither sound in law nor in morals." (McPherson v. San Joaquin County, 124 Cal. xvii.)

was clearly both a representation to the contractors that such soil would be available, and an agreement that Respondent would furnish it. It is to be construed in connection with the borings chart, which showed that there was no unfitness in the soil except that 10% was soft clay (Deft's. Ex. 16), and the approval of petitioner's plan of work and plant (R. 46), "which was assurance that the chart was correct and justification of reliance on it". Construing all these matters together, as they should be construed, the provision that "Best Grade" soil only should be used was both a representation that sufficient soil of that kind was available, and an agreement to furnish it. (Hollerbach v. U. S. *supra.*)

The importance of an interpretation of these provisions of the contract cannot be overstated: They are in the standard form of Government contracts and until a controlling construction is made by this Court contractors, who rely on the provisions, (as many will), will be led to make extremely low bids, and wherever the soil proves unfit, as here, they will be met with the contention made here that it was their duty to make the unfit soil fit and to find and select satisfactory soil. So, the question will continue to be of widespread interest until it is settled, and will inevitably result in great injustice and unfairness.

Equally, even where there is "Best Grade" soil contractors will be afraid to rely on these provisions and will disregard them, and make unjustifiably high bids, which will be unfair to the Government.

It will be seen by reading the extract in the Note above of the case cited that the provision in that case was contained in a statement of the obligations of the contractor,

and the case at bar is far more favorable to the petitioner because the provisions that "Best Grade" soil only shall be used are such only, and are not contained in a statement of petitioner's obligations.

12. The following issues argued by petitioner in the petition are none of them answered by Respondent, each of which petitioner deems a controlling issue for granting certiorari, viz,—

(a) Respondent failed and refused to pay petitioner money it conceded to be due him, and which it had no right to hold (ps. 16, 17 Ptn.).

(b) Petitioner had many good grounds for rescinding and it rescinded, and Respondent served written objections thereto, but none of them were valid, whereby rescission became effective ((12) p. 17 Ptn.).

(c) Respondent proved that there were cypress trees throughout the entire length of the borrow pits (Bot. R. 53), which made it necessary to dig deeper or go out farther for the material (Top R. 54), which involved the loss of 30 to 40% of time (R. 44), and required a large amount of additional machinery,—about a dozen machines instead of three as provided in the plan approved, (R. 35, 36; Plf's. Ex. 28, and Deft's. Exs. 52 A-D and Ex. 18), yet Respondent refused to pay the increased cost, but required petitioner to continue on the contract terms (R. 11; (10) Ptn. p. 16).

(d) Petitioner urged, (Ptn. ps. 17, 18, 19), that Respondent was not entitled to recover on its counterclaim for the reasons therein shown, particularly that the agree-

ment to furnish "Best Grade" soil, and an implied warranty that the soil furnished would be fit, were both conditions precedent, and neither of them was performed.

(Note: Respondent does not question petitioner's computation of the amount due as being $313,060.17. (Ptn. p. 17.)

13. As to the finding that respondent demanded that petitioner furnish additional equipment because progress was unsatisfactory, (p. 6, Rspdt's. Brf.) and that petitioner had completed about 45% of the work in 91% of the contract time, *(Id.* pp. 5, 6), petitioner when he encountered the cypress trees was compelled to dig deeper or go out further for material, (New, R. 54), and was delayed by the cypress trees 30 to 40% (O'Mera, R. 44), and respondent proved that petitioner lost most of 160 days and parts of every other day through the bad condition of the soil. (Deft's. Ex. 52 A-D.)

14. As to the finding that,—

> "at no time did petitioner appeal from the decision of the contracting officer to the Secretary of War" (R. 36),—

petitioner protested repeatedly during the progress of the work, and also in the notice of rescission that sub-surface conditions differed materially from those represented by the chart and in the contract and specifications (R. 45, 48, 49), and the Government, as the result thereof and of slides, found it necessary to and did make adequate borings, soil analysis and stability computations to determine whether the soil available was such that it was physically possible to construct the levee with it (R. 52), but, although thus fully advised that the soil differed materially from what was represented, the contracting officer never made the

changes in the drawings and/or specifications, and never adjusted or offered to adjust the increased cost as provided by Articles 3 and 4 of the specifications.

Nor did the contracting officer decide the question of fact arising under the contract as to there being a material difference in sub-surface conditions from those shown on the drawings or indicated in the specifications (R. 45, 48, 49, 10), so that no appeal was possible,—there was nothing from which to appeal.

15. As to the finding that

> "On December 12, 1932, petitioner * * * advised the contracting officer that it elected to rescind the contract, contending that subsurface or latent conditions * * * differed materially from those represented in the plans and specifications (R. 36),"

petitioner stated in his notice,—

> "if mutual satisfactory adjustments can be made, I am willing to proceed with the work and to that end I hold myself in readiness to discuss this matter with you * * *." (R. 36.)

The contracting officer replied, December 14, 1932, that petitioner's notice did not show how the conditions differed, and he requested such information, signed by two persons who had no interest, saying in conclusion "you are expected to proceed with the work called for under the terms of the contract." (R. 10, 11.)

Petitioner offered, December 16, 1932, to discuss the question. (Deft's. Ex. 13.)

January 3, 1933, the contracting officer advised petitioner that, owing to the failure to so prosecute the work as to

complete it within the contract time, the right to proceed was terminated. (R. 12.)

(11) As to the finding of the Court of Claims that plaintiff could have satisfactorily completed the work in the agreed time with the available material (R. 37),—this finding is in direct and complete conflict with respondent's own record, showing that petitioner lost 160 days, and parts of every day through the bad condition of the soil, (Deft's. Ex. 52 A-D), and that completion on time was impossible. *(Id.)*

The Court below also found that defendant was negligent in handling material when wet, and impounding water in partial fills (R. 37), but all the material was wet *(Id.)*, and such quantities of water ran out of the soil that it necessarily accumulated between fills, ((i), Ptn. Note 6, p. 4).

(12) Respondent proved that placing the material was worth 20 cents per cubic yard, (New, R. 54; Finn, R. 56; Dee, R. 48; McWilliams, R. 51; Note 18 Ptn.).

Conclusion.

It is respectfully urged that certiorari should be granted for the reasons urged in the Petition and hereinabove.

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